

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Part 22 of the Commission's)	WT Docket No. 03-103
Rules To Benefit the Consumers of Air-Ground)	
Telecommunications Services)	
)	
Biennial Regulatory Review-Amendment of)	
Parts 1, 22, and 90 of the Commission's Rules)	
)	
Application of Verizon Airfone Inc. for Renewal)	File No. 0001716212
of 800 MHz Air-Ground Radiotelephone License,)	
Call Sign KNKG804)	

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION
OF AIRCELL, INC.**

Pursuant to Section 1.429 of the Commission's rules, AirCell, Inc. ("AirCell"), hereby petitions for reconsideration of a portion of the Commission's Report and Order released February 22, 2005 ("*Order*") in the above-referenced air-to-ground ("ATG") docket. 1/

Specifically, AirCell seeks reconsideration of the Commission's decision to permit the incumbent narrowband ATG licensee, Verizon Airfone ("Verizon"), to have two years from the grant date of any new ATG band license to consolidate its current operations into 1 MHz of spectrum. AirCell also seeks reconsideration of the Commission's decision to renew Verizon's expired narrowband ATG license for a five-year term.

1/ *Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services*, WT Docket No. 03-103, Report and Order, FCC 04-287 (rel. Feb. 22, 2005) ("*Order*").

I. THE CONSOLIDATION OF VERIZON’S NARROWBAND OPERATIONS WITHIN THE ATG BAND SHOULD BE REDUCED TO SIX MONTHS FROM CLOSE OF THE ATG AUCTION

A. Neither the Record nor the Commission’s Findings Supports a Two-Year Transition Period that Will Delay the Provision of Broadband ATG Service to the Public

AirCell applauds the Commission’s decision to reconfigure the 4 MHz ATG band to permit the provision of innovative, affordable broadband services to the nation’s airline passengers. AirCell fully supports the Commission’s stated intention to provide for broadband ATG services “in the near future,”^{2/} which is consistent with the Commission’s charge under the Communications Act to promote the “rapid development of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays.”^{3/} Likewise, AirCell agrees that “it is imperative to clear the incumbent narrowband system from a minimum of three megahertz of spectrum *as soon as reasonably practicable*.”^{4/} Furthermore, the Commission is correct that, as the original ATG band was intended to accommodate six competing licensees, Verizon “has never had a right to exclusive use of the band.”^{5/} Given the preceding findings, therefore, AirCell is mystified why the Commission would give Verizon a full two years from the grant date of the first new ATG license to confine its narrowband operations to 1 MHz of spectrum.

^{2/} Order at ¶ 77.

^{3/} 47 U.S.C. § 309(j)(3)(A). See also Order at ¶ 30 (citing the Commission’s “strategic objective” of encouraging “the growth and *rapid deployment* of innovative and efficient communications technologies and services.” (emphasis added)).

^{4/} Order at ¶ 77 (emphasis added).

^{5/} Order at ¶ 77.

As the *Order* itself recognizes, the grant of any ATG license is at least a year away. ^{6/} However, the actual wait could be significantly longer. In recent auctions, just the processing time from the close of the auction to license grant has been as long as 8 months. ^{7/} Thus, it could quite conceivably be three-and-a-half or even four years from the date of the *Order* before Verizon would be required to give up its current *de facto* exclusive use of the full 4 MHz ATG band. Because sharing is not possible between narrowband and CDMA broadband systems, even under the *Order*'s optimistic time estimate for license grant, affordable broadband ATG service may not become a reality until sometime in 2008, even though the technology is available today. AirCell, for example, is rapidly moving beyond the experimentation stage, as it plans to begin public demonstrations this July of an on-board picocell and an air-to-ground broadband link, key components of AirCell's planned broadband ATG system. Based on its progress to date, as well as its years of experience providing ATG service using cellular spectrum, AirCell expects that, by taking advantage of the period between the auction close and license grant to begin constructing a network, ^{8/} AirCell would be capable of launching a broadband ATG service within a few months of receiving an ATG license, should AirCell be successful at auction. Thus, in the event Verizon is not successful at auction, a two-year transition period would delay the ability of "ready and able" parties such as AirCell from making affordable broadband ATG services available to the public.

Moreover, the fact that AirCell would have to wait two years before earning revenue from an ATG license lowers the potential value of an ATG license from AirCell's

^{6/} *Order* at ¶ 77.

^{7/} For example, Auction 56 (24 GHz) closed in July 2004, and the licenses were granted in March 2005; Auction 57 (AMTS) closed in September 2004, and the licenses were granted in April 2005.

^{8/} AirCell understands that any construction prior to license grant would be at its own risk.

perspective. By contrast, if Verizon wins an ATG license, it will be in control of how quickly it begins providing service, and could do so immediately upon license grant. Thus, given that the same diminution in value is not present from Verizon's perspective, the two-year transition effectively acts as a type of perverse "bidding credit" for the well-financed carrier. Because Verizon will be bidding on a 10-year license, while other auction participants will, in effect, be bidding on an 8-year license, the transition period creates a significant bias in favor of the incumbent.

AirCell does not comprehend – nor does the *Order* attempt to explain – how a two-year, regulator-imposed delay could possibly be in the public interest. Not only would there be significant opportunity costs incurred due to such a delay, but there are also important safety and homeland security considerations, given the fact that broadband service promises important improvements to in-flight safety and monitoring. ^{9/} Moreover, the Commission itself notes that "demand for Airfone's service has markedly declined in recent years, and the company's system is approaching technological obsolescence." ^{10/} Although the Commission indicated that a new ATG licensee "could seek to negotiate and compensate Verizon Airfone to relocate earlier than required by the terms of Verizon Airfone's new license," Verizon nevertheless "will not be obligated to engage in such negotiations." ^{11/}

AirCell believes the *Order* is vulnerable to a challenge under the Administrative Procedures Act ("APA"), given that the *Order* adopts a decision (the two-year transition) that is antithetical to the findings in the *Order*, and cites to nothing in the record to support such a long

^{9/} For example, the Federal Air Marshal Service ("FAMS") in the Department of Homeland Security has indicated a strong interest in a broadband ATG service. *See, e.g.*, Letter from Robert Bray, Dep. Asst. Dir., FAMS, to Marlene H. Dortch, FCC Secretary, filed in WT Docket No. 03-103 (April 11, 2005).

^{10/} *Order* at ¶ 78.

^{11/} *Id.*

transition. ^{12/} Indeed, there was no explanation whatsoever regarding the basis of the Commission’s decision, calling into question the presence of any “reasoned decision-making.” ^{13/} Even Verizon itself did not specifically seek the two-year “substantial [transitional] period” ^{14/} bestowed upon it by the Commission; Verizon asked only for a “limited transitional period.” ^{15/}

AirCell does not believe the consolidation of operations from 4 MHz of the band into 1 MHz of the band would require a significant expenditure of time or resources. Although AirCell is aware of nothing in the record that describes the process Verizon will need to undertake, it is AirCell’s assumption, based on AirCell’s own experience with ATG systems, that:

(1) Verizon’s radios already have the capability to tune to any frequency within the 4 MHz ATG band, consistent with the original ATG rules that permitted sharing of service channels throughout the entire band; and (2) Verizon has the capability to remotely control the tuning of its ground stations, such that on-site visits may not even be necessary. Even if site visits were required, Verizon’s network consists of only 135 ground stations. ^{16/} Such a small number of sites could

^{12/} To avoid being arbitrary and capricious, agency decisions must be supported by “substantial evidence.” *See Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683-86 (D.C. Cir. 1984) (arbitrary and capricious standard incorporates substantial evidence test); *see also Reservation Tel. Coop. v. F.C.C.*, 826 F.2d 1129, 1135 n. 4 (D.C.Cir.1987) (agency must supply a “persuasively reasoned explanation” that is “rationally grounded in the evidence before the agency”).

^{13/} *See, e.g., Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1324 (D.C. Cir. 1991) (“Where the agency has failed to . . . explain the path that it has taken, we have no choice but to remand for a reasoned explanation for the conclusion.”); *Public Media Center, et al., v. F.C.C.*, 587 F.2d 1322, 1331 (D.C. Cir. 1978) (“As this court has repeatedly emphasized, ‘the failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible.’”).

^{14/} *Order* at ¶ 77.

^{15/} *Order* at ¶ 76 (citing Verizon Comments at 10).

^{16/} *See* “Airfone Service for Verizon Wireless; Frequently Asked Questions,” available at <<http://www.verizonwireless.com/>> (“When a call is placed, information is sent from the Airfone handset to a receiver in the plane and then down to one of the 135 ground radio base stations located strategically throughout North America.”).

easily be retuned in a matter of a few months or less. Indeed, even the Commission recognized that “any burden that might be incurred by Verizon Airfone to relocate its operations . . . should be minimal.” [17/](#) Accordingly, limiting the transition period to six months from the auction close date would be more consistent with the Commission’s conclusions and the degree of ease with which Verizon should be able to implement the transition.

Moreover, the consolidation of Verizon’s current service into a smaller spectrum block will not be complicated by the need to transition a large number of users. First, the transition will be invisible to end users. Verizon will simply be limited to operating on a subset of the channels to which it currently has access. Second, as the Commission recognized, the usage of the obsolescent ATG system has dwindled by 80% in recent years, down to two or three users per aircraft per day. [18/](#) Thus, it is difficult to imagine that with continued access to one-fourth of the ATG band, Verizon would experience any capacity constraints.

Unless Verizon can demonstrate with specificity that any of the assumptions set forth above are materially incorrect, the Commission should reduce the length of the transition period to six months from the close of the auction. Unless and until the Commission knows what is involved in consolidating Verizon’s current operations, it cannot make an informed decision regarding the appropriate length of any transition.

B. Verizon Is Not Subject to a “Relocation” and Analogous Precedent Does Not Support a Long Transition Period

The Order repeatedly uses the terms “relocate” or “relocation” to describe the process by which Verizon will confine its operations to a 1 MHz block within the ATG band. [19/](#) If this were a true relocation, AirCell might understand how a longer transition period could be

[17/](#) Order at ¶ 78.

[18/](#) Order at ¶ 23 and note 99.

[19/](#) Order at ¶¶ 76-78.

justified, consistent with prior relocation precedent where licensees were forced to deploy new equipment. However, AirCell submits that the process here does not constitute a “relocation” as that term is generally understood in Commission precedent. Typically, relocations involve situations whereby a licensee vacates all of its current frequencies and re-commences operations on a different set of frequencies. Here, by contrast, Verizon will not be initiating service on any new frequencies; it will simply be discontinuing use of a portion of the “shared” spectrum to which it currently has access.

The most analogous precedent to the instant situation can be found in a recent Commission decision involving a change to the shared spectrum band plan used by satellite operator Globalstar. [20/](#) Like Verizon, Globalstar was the only service provider in a band that was originally intended to be shared among multiple providers. The Commission determined that it was in the public interest to re-designate a 5 MHz portion of the band for use by the terrestrial Broadband Radio Service. [21/](#) Notably, the Commission did not provide for a transition period in this case; the new band plan became effective with the order, 30 days after publication in the Federal Register. In reaching its decision in this order, the Commission explained that:

[T]his [new band plan] is appropriate because the original Big LEO band plan was based on up to four CDMA MSS operators sharing the spectrum, and the sole remaining CDMA MSS operator should not expect to have unfettered access to [the entire band]. [22/](#)

[20/](#) See *Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems*, Report and Order, Fourth Report and Order, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 13356 (2004) (“*MSS Sharing Order*”).

[21/](#) Although Globalstar was not required to entirely cease operations in this portion of the band, Globalstar was required to “accept any interference from the terrestrial services within this band,” *MSS Sharing Order* at ¶ 73. Globalstar viewed the change as effectively “taking away some of its spectrum.” *Id.* at ¶ 81.

[22/](#) *MSS Sharing Order* at ¶ 66.

[T]he Globalstar license never conferred an unconditional right to operate in the entire spectrum originally assigned for shared use by multiple CDMA systems. Globalstar’s license to operate in Big LEO spectrum stems from the spectrum sharing plan adopted in the *Big LEO Order* As a result of this band sharing plan and agreement, Globalstar should have had no reason to believe it had the sole right to the spectrum if other operators failed to implement their systems [Under the new plan,] *Globalstar may need to change parameters of operation in shared parts of the band, but not the physical equipment* [23/](#)

The similarity of the situation described above with the instant circumstances makes the *MSS Sharing Order* more relevant precedent than any of the Commission’s prior “relocation” orders. Thus, where an incumbent is not required to change its equipment, but only the parameters of its operations within its existing band, the Commission has not found it necessary to provide a transition period. Accordingly, a two-year transition period for Verizon is simply not justified. [24/](#) Moreover, in this case there are additional public interest considerations, including the fact that there is currently no broadband ATG service suitable for the domestic market available to meet the significant consumer demand for such service.

II. THE COMMISSION SHOULD REDUCE THE RENEWAL TERM OF VERIZON’S NARROWBAND ATG LICENSE TO TWO YEARS

AirCell also seeks reconsideration of the Commission’s decision to renew Verizon’s expired narrowband ATG license KNKG804, for a five-year term. Like the Commission’s decision to establish a two-year transition period, the five-year license renewal term was adopted without explanation and without any basis of support in the record, making it equally

[23/](#) *MSS Sharing Order* at ¶ 86 (emphasis added).

[24/](#) Even in the recent 800 MHz rebanding proceeding, which was far more complex, with more spectrum, more licensees, and a series of relocations, the Commission only allowed Nextel a total of three years (with 18 months as an interim benchmark for a significant portion of the moves) to complete the transition. *See Improving Public Safety Communications in the 800 MHz Band, Report and Order*, Fifth Report and Order, and Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969 (2004) at ¶ 28.

vulnerable to challenge under the APA. [25/](#) This is especially true – again like the decision on the two-year transition period – because the five-year renewal term will achieve a result that is contradictory to the Commission’s stated goal of promoting competition in the ATG band. [26/](#)

Under one not unrealistic scenario, Verizon could marshal its considerable financial resources to become the successful bidder for the 3 MHz license under band plan 2 or 3. Such a scenario would thwart the Commission’s intention to establish competition in the ATG band. [27/](#) In this case, Verizon obviously would be motivated to move quickly to consolidate its narrowband offering into the 1 MHz license block in order to deploy its broadband offering as soon as possible. Meanwhile, if it were to maintain its narrowband operations in the 1 MHz block for its full five-year license term, the auction winner of that spectrum would be prevented from commencing operations until 2010. Under this scenario, the Commission would be positioning Verizon as the sole licensee for 800 MHz ATG services for five years, thereby giving the company a tremendous head start in the marketplace.

In order to protect the concept of competition in the ATG band, even under band plans 2 and 3, the Commission should limit the renewal term of license KNKG804 to two years, but with the understanding that Verizon may apply for special temporary authority (“STA”), in 180 day increments, [28/](#) to continue its narrowband operations in the 1 MHz block, up until the time at which the winning bidder of the D or E block license can demonstrate that it is ready and able to commence its service offering. This would minimize the head start Verizon could obtain at the expense of the D or E block licensee, while ensuring continuity of narrowband service

[25/](#) See *supra* at 4-5.

[26/](#) See *Order* at ¶ 1.

[27/](#) See *Order* at ¶¶ 29, 41.

[28/](#) See 47 C.F.R. § 1.931(a)(3) (STAs may be granted for 180 days).

availability in the ATG band. Even if Verizon were not the winner of the C or F block license, a two-year renewal term would in any event permit the D or E block auction winner to deploy its service as expeditiously as possible and minimize the head start that will be available to any winner of the C or F block license.

Finally, there is an equally important reason why Verizon's license term should be reduced to two years even if band plan 1 (two overlapping licenses) is successful. During the transition period under band plan 1, Verizon's narrowband operations at the upper end of the ATG band will require the systems of the A and B block licensees to be fully overlapped, rather than only 2/3rds overlapped. This will result in degradation of the isolation between the two networks, which in turn will reduce the capacity of both carriers as well as require more extensive coordination of site locations in order to avoid creation of near-far interference issues. While AirCell proposed this band configuration for the transition period, it did not imagine that Verizon's dwindling legacy network would be permitted to continue operations for five years. While there would likely be little noticeable impact during the first couple of years as the licensees construct their networks and build up their customer base, continuing the full overlap beyond this point would likely have an adverse impact on the licensees' ability to provide services. ^{29/}

CONCLUSION

Should AirCell be successful in the ATG auction, it believes it is well positioned to commence a broadband service offering within months of receiving its license. Thus, the long transition period provided for in the *Order* would needlessly delay the provision of affordable broadband ATG services to the American public. Accordingly, Verizon should be required to consolidate its narrowband operations into a 1 MHz spectrum block within six months of the close

^{29/} Similar to the suggestion above regarding the band plan 2 or 3 scenario, the Verizon narrowband license should be eligible for extensions via STA until at least one of the A and B block licensees can demonstrate that it is ready to commence service.

of the ATG auction. Moreover, Verizon's narrowband ATG license, KNKG804, should be renewed for a term of only two years, with the possibility of six month extensions (until the auction-winner licensee is ready to provide service) via grants of special temporary authority.

Respectfully submitted,

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